Looi Kwai Fong v Lai Wai Kett & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO RS 12–65 OF 1998
PS GILL J
29 AUGUST 1999

Damages (Personal Injury or Death) *— Personal injuries — Loss of future earnings — Whether the appellate Court was entitled as it did to deduct a further $^1/_3$ for contingencies — Doctrine of 'stare decisis' — Civil Law Act 1956 s 28A(2)(d)*

The issue raised in this appeal by the second appellant is whether the appellate Court was entitled as it did to deduct a further $^1/_3$ for contingencies, other vicissitudes of life and accelerated payment, from the damages for personal injuries, awarded to the second appellant.

Held, dismissing the appeal:

(1) Despite the introduction of s 28A(2)(d) of the Civil Law Act 1956 ('the Act'), in respect of damages for personal injury, the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payments, continues to be in force as Parliament had not expressed its intention to depart from the general system of law. Otherwise this intention would have been expressly provided for in the proviso (d) to s 28A of the Act (see p 538B–C, D).

(2) On the principle of 'stare decisis, this court is bound by the principle of law enunciated in *Takong Tabari v Government of Sarawak* [1998] 4 MLJ 512 where the learned trial judge had deducted $^1/_3$ from the total sum calculated for contingencies, other vicissitudes of life and accelerated payment (see pp 539I, 540A–B).

[Bahasa Malaysia summary

Persoalan yang ditimbulkan di dalam rayuan ini oleh perayu kedua adalah sama ada mahkamah rayuan berhak sebagaimana sepatutnya untuk memotong $^1/_3$ lagi untuk kontingensi, jatuh bangun dalam kehidupan yang lain dan tambahan bayaran, daripada ganti rugi untuk kecederaan diri, yang diawardkan kepada perayu kedua.

Diputuskan, menolak rayuan tersebut:

(1) Walaupun pengenalan s 28A(2)(d) Akta Undang-Undang Sivil 1956 ('Akta tersebut'), berhubung dengan ganti rugi untuk kecederaan diri, amalan biasa undang-undang dalm membuat penolakan untuk kontingensi, jatuh bangun dalam kehidupan yang lain dan tambahan bayaran, terus berkuat kuasa kerana Parlimen tidak menyatakan hasratnya untuk menyimpang daripada sistem undang-undang am. Jika tidak hasrat ini sudah tentu dengan nyata diperuntukkan di dalam proviso(d) kepada s 28A Akta tersebut (lihat ms 538B–C, D).

(2) Atas prinsip 'stare decisis', mahkamah ini terikat oleh prinsip undang-undang yang dinyatakan dengan jelas dalam *Takong Tabari v Government of Sarawak* [1998] 4 MLJ 521 di mana hakim perbicaraan yang bijaksana telah memotong $^1/_3$ daripada jumlah keseluruhan yang telah dikira untuk kontingensi, jatuh bangun kehidupan yang lain dan tambahan bayaran (lihat ms 546I, 537A–B).]

Notes

For cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 596–608.

Cases referred to

Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 4 MLJ 182 (refd)
Chan Chin Ming & Anor v Lim Yoke Eng [1994] 3 MLJ 233 (refd)
Chong Kam Siong v Herman bin Baharuddin [1995] 2 CLJ 413 (refd)
Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (folld)

Legislation referred to

Civil Law Act 1956 ss 7(3)(iv) proviso (d), 28A(2)(d)(ii)
Civil Law (Amendment) Act 1984

Ligar Fenandez (*L Fernandez & Co*) for the appellant.
Daljit Singh (*Gurdev, Daljit, Su & Co*) for the respondents.

PS Gill J: The appeal, of the second appellant can be confined to only one issue, whether the appellate court was entitled as it did in the present instance, to deduct a further $^1/_3$ for contingencies, other vicissitudes of life, and accelerated payment, from the damages for personal injuries, awarded to the second appellant.

In the court below, the claim involved was a personal injuries claim, wherein the second appellant as a pillion rider had suffered injuries. He was 21 years of age at the material time.

In assessing damages for loss of future earnings the learned sessions court judge had this to says:

> Berdasarkan keterangan-keterangan yang dikemukakan oleh pihak plaintif saya berpendapat pihak plaintif telah berjaya membuktikan bahawa sebelum kemalangan tersebut plaintif kedua bekerja sebagai 'Mosaic layer' dengan pendapatan purata sebanyak RM1,200 sebulan. Oleh itu kehilangan pendapatan untuk tempoh sebelum perbicaraan iaitu selama 36 bulan ialah RM43,200.
>
> Bagi kehilangan selepas perbicaraan saya bersetuju dengan cadangan peguamcara plaintif bahawa sebanyak RM5 sehari patut ditolak daripada pendapatan plaintif kedua untuk perbelanjaan makanannya. Ini berdasarkan

keterangan SP1 yang menyatakan bahawa dia dan plaintif kedua membelanjakan RM5.00–RM6.00 sehari untuk makanan. Plaintif kedua tidak membayar kos perjalanan ke tempat kerjanya kerana dia menumpang motosikal abangnya (SP1) ke tempat kerja. Oleh yang demikian saya membenarkan award untuk kehilangan pendapatan plaintif kedua selepas perbicaraan sebanyak RM166,920 iaitu RM1,070 x 12 x 13 tahun.

The principal contention of the appellant's counsel before me was that despite the introduction of s 28A(2)(d) of the Civil Law Act 1956, in respect of damages for personal injury, the common law practice of making deductions for contingencies, other vicissitudes of life, and accelerated payments, continues to be in force as Parliament had not expressed its intention to depart from the general system of law. The cases of *Chan Chin Ming & Anor v Lim Yoke Eng* [1994] 3 MLJ 233 and *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 were cited in support.

It was Mr Daljit Singh's contention for the respondent, that such a deduction is contrary, to law, as by the introduction of proviso (d) to s 28A of the Act on 1 October 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life, and accelerated payment, at law, is now no longer available, and with the replacement of that common law practice, there is already a built in deduction in the statutory formula itself. Thus further deduction was improper.

Mr Daljit had also submitted the authorities of *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 MLJ 182 and *Chong Kam Siong v Herman bin Baharuddin* [19951 2 CLJ 413. The purport of the authorities was for damages for personal injuries, post Civil Law (Amendment) Act 1984. Mr Daljit was quick to point that there was barely a hint of any deductions being made from the award of damages for contingencies, vicissitudes of life, and accelerated payment's, in both these authorities.

Faced with these rival contentions, on the interpretation of s 28A(2)(d) Civil Law Act 1956, my only recourse was to examine the relevant section and the case of *Takong Tabari v Government of Sarawak.*

Section 28A(2) of the Civil Law Act 1956 as amended reads as follows:

28A Damages in respect of personal injury

(1) In assessing damages

(2) In assessing damages under this section —

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the court shall take into account:

(i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no

damages for such loss shall be awarded; and in any other case, damages for such loss shall be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured.

(ii) ...

(iii) ...

(d) in assessing damages for loss of future earnings the court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

In *Takong Tabari v Government of Sarawak* [1998] 4 MLJ 512, her Ladyship Siti Norma Yaakob JCA had this to say in respect of a loss of dependency claim, wherein, the learned trial judge there, had deducted a sum of RM90,000 equivalent to $^1/_3$ from the total sum calculated, stating that the $^1/_3$ deduction was for contingencies, other vicissitudes of life, and accelerated payment at pp 522–523:

> As a court that is inferior to the Supreme Court, we are bound by the principle of stare decisis to accept the majority decision in the case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233. That majority judgment states that as a matter of interpretation, if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d) the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

It is abundantly clear on a reading of this authority that it was the ratio decidendi of *Takong Tabari* that the common law practice of making deductions for contingencies, other vicissitudes of life, and accelerated payment, continues to be in force, since it is found such explicitness missing in proviso (d) of s 7(3)(iv) of the Civil Law Act. This principle of law would equally apply to my mind to s 28A(2)(d)(ii) Civil Law Act 1956 as amended, for damages, in respect of personal injury. I see no reason why there should be a distinction between a dependency claim, and a personal injuries claim. The two sections are directly parallel, and it would not be right 'to make fish of one, and flesh of another'. The principles propounded in *Takong Tabari* should apply with equal force in a personal injuries claim.

On the principle of 'state decisis', or what is commonly known as the principle by which an inferior court is bound to follow decisions of superior courts, I am bound by the principle of law enunciated in *Takong Tabari*.

The authorities of *Abdul Ghani bin Hamid* and *Chan Kam Siong* cited by counsel for the respondent should be viewed with askance today in the light of *Takong Tabari*.

Thus, I held on appeal that the learned sessions court judge had erred when he did not make a $^1/_3$ deduction for contingencies, other vicissitudes of life, and accelerated payment for damages, for loss of future earnings. I accordingly deducted and reduced the claim from RM210,120 to RM137,000.

Appeal dismissed.

Reported by Wong Siok Chin